No. 10211

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IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES NATHAN LOWERY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

Appellant's Opening Brief

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STATEMENT OF JURISDICTION

The appellant was indicted for violation of the Act of December 17, 1914, as amended, and violation of the Narcotic Drugs Import and Export Act in two counts in the District Court of the United States for the Western District of Washington, Northern Division, on May 27, 1942 (Tr. 2). The charges involved violations of Sec. 2553-A, Internal Revenue Code, and Sec. 174, Title 21, U.S.C.A. On the 6th day of June, 1942, the defendant

entered a plea of not guilty to Count I and Count II of the indictment (Tr. 5). The appellant made a motion supported by affidavits, for suppression of evidence, which was heard on the 6th day of July, 1942. This motion was argued and denied (Tr. 24). The appellant waived a trial by jury (Tr. 23). Count I of the indictment was dismissed on motion of the Government at the end of the Government's case, and the trial resulted in a verdict of Guilty as to Count II. (Tr. 25).

The District Court had jurisdiction (28 U.S.C.A. 41, Jud. Code, Sec. 24, par. I). The Circuit Court of Appeals had jurisdiction (28 U.S.C.A. Sec. 225, Jud. Code, Sec. 128).

STATEMENT OF THE CASE

Appellant was indicted, tried, and convicted in the United States District Court, Western District of Washington, Northern Division, for the crime of possession of narcotics. Count I of the indictment was dismissed upon motion of the Government at the end of the Government's case. The evidence introduced at the trial of this case showed that the appellant got off a United Airlines Plane about one o'clock A. M. on March 29, 1942, at the Boeing Airfield, Seattle, Washington. Appellant took his grip and proceeded to the Boeing Airline cab, which was waiting to drive passengers into town. The appellant turned his bag over to the driver of the cab, at which time a Federal Narcotic Agent, Hain, who was present with Narcotic Agents Smith and Giordano and City Detective Belland, took the bag from the driver, at the same time stating that

they were Federal Officers (Tr. 40). The appellant went to the Federal Courthouse with the officers and en route to the Courthouse, in answer to a question by one of the agents as to how much he had in the bag, appellant answered, "Ten." (Tr. 50). At the Federal Courthouse, the contents of the bag were removed, and they proved to be ten cans of smoking opium.

The record does not disclose that the defendant has ever before been convicted of any crime.

The testimony of the Federal Narcotic Agent Donald Smith showed that he was 27 years of age, and had worked a little less than one year in the narcotic division of the Government. His testimony was that the first information he had of Lowery was in a report on June 11, 1941, by an officer from the California narcotics division, stating that appellant was suspected of traffic in narcotics between California and Montana (Tr. 41). The testimony of Narcotic Agent Giordano and City Detective Belland showed that the only information they had about the appellant was from this same report from the California office of the narcotics division. Both officers testified that they investigated the report but were unable to find that the appellant was trafficking in narcotics or was associated with narcotic peddlers, or had a reputation of being engaged in narcotic traffic (Tr. 48, 50 and 51). Testimony of Narcotic Agent Smith was also to the effect that an informer who had been working for him about six months prior to the time of the arrest of appellant had shown him a copy of a letter indicating that appellant was to arrive on the plane on March 29, on which he did ar-

rive (Tr. 42). Smith's testimony was that the informer was paid $150.00 after the arrest of Lowery, and that he had never secured the arrest of anyone prior to appellant's case on the basis of information furnished him by the same informer (Tr. 43). Smith further testified that he did not know whether the informer was a dealer in narcotics (Tr. 43). Officer Belland testified that as head of the narcotics division of the Seattle Police Department, he keeps a record of narcotic addicts and peddlers; that his investigation failed to disclose any activity of the appellant in narcotic traffic (Tr. 47).

Officer Giordano testified that he never found any evidence of the truth of the suspicion set forth in the letter or report of June 11, 1941, which was the basis of the investigation of appellant (Tr. 41).

Officer Bangs, who has charge of the Fifteenth Narcotic District, testified that the only information that he had about appellant was from the letter which he received in June, 1941; also that the informer used in this case had never been used in an investigation which resulted in the arrest and conviction of a defendant prior to the Lowery case (Tr. 54). Officer Bangs further testified that on March 26th and again on March 28th, he had evidence that appellant was acting for narcotic peddlers, but he made no attempt to procure a warrant for his arrest or for his search (Tr. 56).

Appellant presented a motion to suppress the evidence, which was argued and denied before the trial commenced. Appellant objected to the introduction of any evidence with reference to the narcotics, contend-

ing the same were obtained by means of unlawful search and seizure. At the end of the Government's case, appellant moved for a dismissal of the case on the ground and for the reason that the evidence upon which the case was based had been obtained through unlawful search and seizure in violation of the 4th and 5th Amendments of the Constitution of the United States. The motions were denied and the appellant found guilty on Count II (Tr. 25). Appellants presented motions for new trial, for dismissal of the action, and for arrest of judgment and stay of proceedings, all of which were argued and denied on July 20, 1942 (Tr. 28). Judgment and sentence were pronounced, finding the appellant guilty, and sentencing him for the period of twenty-one months in the United States Public Health Service Hospital at Fort Worth, Texas, and sentencing him to pay a fine in the sum of $500.00 (Tr. 30).

ASSIGNMENT OF ERRORS

Appellant is relying upon the following assigned errors:

1. That the Court erred in denying Appellant's motion to suppress the evidence and exhibits in the case, for the reason and upon the ground that there was an unlawful search and seizure of the person and property of the Appellant in violation of his constitutional rights.

2. The Court erred in denying Appellant's challenge to the sufficiency of the evidence at the close of the entire case, and in the refusal of the Court to dis-

miss Count Two of the Indictment upon the ground and for the reason that all of the evidence in the case was obtained by means of unlawful search and seizure of the person and property of the Appellant.

ARGUMENT

As both assignments of error relate and are based upon an unlawful search and seizure of the person and property of the appellant, in violation of his constitutional rights, the same will be treated jointly in presenting this argument. Appellant contends that the search and seizure of himself and his personal belongings and his arrest were unlawful, and in violation of the 4th and 5th Amendments to the Constitution of the United States.

Even at common law, the right of the people to be secure in their persons, houses, and effects against unreasonable search and seizure was recognized. This common law right of course was enacted into the Constitution of the United States when the Fourth Amendment was adopted. The rule has been adopted and followed that a warrant of some kind is necessary in order to effect this search and seizure of a person, his property and effects. An exception to that rule has always been that where officers have probable cause to believe that an offense is being committed, they have a right to search and seize without a warrant.

In *Cardinal v. United States*, 79 Fed. (2) 825, it was held that entry and search without a warrant was illegal, unless officers had probable cause to believe that an offense was being committed.

In *United States v. Batune,* 292 Fed. 497, it was held that to justify a government agent in making an arrest and search and seizure without a warrant, he must have such knowledge from the employment of his own senses or from information actually imparted to him by another as to cause him honestly and in good faith, acting with reasonable discretion, to entertain the belief or suspicion that the law is being violated.

Belief alone, however well founded, that an article is concealed in a dwelling has been held to be no justification for search without a warrant notwithstanding that the facts unquestionably showed probable cause in the case of *United States v. Baldocci,* 42 Fed. (2) 567. Probable cause has been held to mean reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing that the person is guilty of the offense charged. *United States v. Hayes,* 52 Fed. (2) 977.

The rule is that there should be a liberal construction in favor of the defendant of the Fourth Amendment in legislation regulating search warrants, and it has been held that the guarantees of the Fourth Amendment must be liberally construed to prevent impairment of the protection extended by such amendment.

Go-Bart Importing Co. v. United States, 282 U. S. 344;

Grau v. United States, 287 U. S. 124.

In *Gouled v. United States,* 255 U. S. 298, it was held that the provisions of the fourth amendment protecting against unreasonable seizure and search are indispensable to the full enjoyment of personal security,

liberty and private property and should receive a liberal construction to prevent an encroachment on the rights secured by them.

The case of *United States v. Tom Yu,* 1 Fed. Supp. 357, involved the same charges as is set forth in Count II of the Indictment in the instant case, and is somewhat analogous to our present situation. The facts there disclose that a narcotics agent received information to the effect that smoking opium was being shipped to a designated address and was being there distributed. The narcotics agent had no personal knowledge of any of the facts, but acting upon the hearsay information received, he, together with another agent and a deputy sheriff, went to the defendant's residence. The officers claimed that on approaching the building they smelled the fumes of smoking opium and after returning a second time and again smelling the fumes of smoking opium, broke in the door and arrested the defendant and searched the premises, finding therein a quantity of opium. The Court, in granting a motion to suppress, stated as follows:

> "The important question to determine is whether the information conveyed to the officers and the fact that they smelled the fumes of smoking opium was sufficient to justify an honest belief that a crime was being committed in their presence. The search of the defendant's dwelling without a warrant was unlawful unless it can be said that a crime was being committed in his presence." (P. 359). * * * *
>
> "In the case of *Byars v. U. S.,* 273 U. S. 32, 47 S. Ct. 248, 249, 71 L. Ed. 520, it is said: 'Con-

stitutional provisions for the security of person and property are to be liberally construed, and 'it is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.' *Boyd v. U. S.,* 116 U. S. 616, 635, 6 S. Ct. 524, 535, 29 L. Ed. 746.' '' See, also, *Gouled v. U. S.,* 255 U. S. at p. 305, 51 S. Ct. 261, 65 L. Ed. 647.

''Regardless of how desirable or necessary it may be to suppress the traffic in narcotic drugs, yet well-founded principles of law cannot be ignored, nor constitutional guaranties disregarded to accomplish the purpose.'' (P. 360.) * * *

Although the above case dealt with search of a residence the same general principles involved apply to the search of a person.

The case of *United States v. Schultz,* 3 Fed. Supp. 273, shows that the officers had received information of the illicit use of the premises involved. After approaching the premises they detected some odors. The Court held that unless such information was based upon personal observation or perceptions, such information was purely hearsay and did not authorize search without a warrant. In that case the Court cites *Gorski v. United States,* 1 Fed. (2) 620, to the effect that an arrest may not be made on mere suspicion. The case of *Hague v. Committee on Industrial Organization,* 101 Fed. (2) 774, held that to justify a search and seizure without a warrant the officers must have direct personal knowledge through their hearing, sight, or other sense, of the commission of a crime by the accused.

The case of *United States v. Banks,* 24 Fed. (2) 973, shows that the narcotic agents had information that the accused was in possession of some narcotics. They went to the accused's apartment, knocked on the door and stated they were Federal narcotic agents. By virtue of their declaration of being officers, the accused opened the door and let them in. The accused was disrobed and they discovered by an examination of his arm that he was a drug addict and they thereupon searched the apartment and found a quantity of heroin. The Court held that the agents had no probable cause and having entered without a search warrant the search and seizure was illegal. The Court also held that consent to the search was not freely given by the fact that the accused opened the door stating that the accused had no alternative when the officers made their identity known, and asked admittance, even though he put up no resistance. In the instant case, the situation was the same, as Lowery put up no resistance when the agents identified themselves, feeling, of course, that he was under arrest, as did the accused in the *Banks* case.

In the case of *Carroll v. United States,* 267 U. S. 132, it was held that the search and seizure was lawful. However, the facts shown were much stronger than in the present case, as two and one-half months before the arrest, the Federal agents had actually agreed to buy whiskey from the defendant, under guise. They had actually talked to the defendant, and he had agreed to sell whiskey to them. At the time of the arrest the defendant was driving the same car that he had two and one-half months before, and the agents stopped him and arrested him, and seized the contents of the car. In

that case there was, of coure, direct contact and direct agreement for the sale of whiskey with the defendant himself. However, even then, Justice Reynolds delivered a vigorous dissenting opinion contending there was not probable cause for the arrest.

In the case of *Ganci v. United States,* 287 Fed. 60, the Court held there was an unreasonable search, and no probable cause to base a search on. In that case, one Smith, a peddler of narcotics and an informer, was given money by the narcotics agents to buy narcotics from defendant Lusco. Smith went with Lusco and waited outside an apartment house for him. Lusco brought out a package of narcotics and the agents being present seized him. Smith when he had been negotiating with Lusco had told the officers that he had seen defendant Ganci present. The agents after the arrest of Lusco went to the apartment house and in searching the house came across a barber shop owned by the defendant Ganci, and searched the same and found narcotics and thereupon arrested Ganci. The Court held that there was no probable cause to justify the search of Ganci's barber shop and that the search was unreasonable and therefor unlawful.

At p. 661, the Court used the following language:

> "We must not be tempted to avoid the preservation of constitutional safeguards because of the nature of the crime charged nor because of difficulties in detecting crime. We realize the insidious and dangerous character of the narcotics concerned in this case and appreciate the skill necessary to discover the traffickers. The Supreme Court, however, has never permitted the obnoxious

> nature of a crime nor the difficulties of detection to dim its view as to the necessity of preserving, at any cost, our hard-won constitutional safeguards, and it may be tritely observed that a stern adherence to that preservation makes both for liberty and order in the long run."

The case of *United States v. Robstein,* 41 Fed. (2) 227, holds that a forcible entry into a locked room in a bottling plant and the searching thereof without a warrant on detecting an odor of alcohol emanating therefrom was illegal.

In the case of *Emit v. United States,* 15 Fed. (2) 623, defendant's car was searched without a warrant. The officers had some information about the defendant's activities and the car of the defendant had been seen parked at a place supposedly used by cars hauling liquor, and it came from a place having a reputation as a haven for bootleggers. The Court held that the search was unlawful as it was based on mere suspicion and not on probable cause.

In the case of *Pales v. Poali,* 5 Fed. (2) 280, the agent had information that the car that was hauling the illegal articles was to travel over a certain road at a certain time with a description of the car and driver. The agent shot at the car and the Court in a case where the agent was on trial and was trying to justify his actions, held that the facts did not justify his actions, that the same were unreasonable, and that he had no probable cause for his actions.

It is submitted that all of the cases which have held the search and seizure sufficient and reasonable have

had much more evidence than in the instant case. In the case of *United States v. Rogers*, 53 Fed. (2) 874, the facts showed that a great volume of illicit beer traffic was carried on on the highway where the defendant was stopped. Also, the truck the defendant was driving had been seen at a "beer drop" and had been seen driven to an apparent saloon. The case of *Carroll v. United States, supra,* as set forth, had many more facts.

In the instant case, there was nothing in the appearance of appellant, nor in the fact that he came off the plane with a grip and gave the same to the airline cab driver which would give rise to any belief that he was committing a crime. His actions were entirely consistent with a legitimate use of the grip, and do not warrant a reasonable belief that he was committing any crime. The fact that the officers claim they had information from an informer in itself is not sufficient. If it were, anyone carrying a suitcase could be stopped and be subjected to search merely because someone had informed the officers that he or she was breaking the law.

It is respectfully submitted that the above cases bear out that hearsay information by a federal agent, not based upon any personal knowledge or any other circumstances, or anything about the appearance of the appellant is not sufficient to authorize a search without a warrant. There is no evidence that Lowery was engaged in any regular narcotic traffic, or that he was engaged regularly in transporting narcotics by plane, or in any other manner. The officers all testified that

their original information about Lowery trafficking in narcotics was not borne out after investigation. Officer Belland testified that Lowery was not known as a narcotic addict or narcotic trafficker. The only information here was the hearsay information given to one of the officers by the informer.

The narcotic agents testified that they had full information of Lowery's activities as early as March 24th, and that on March 28th, they had full information that he was to arrive in Seattle on the morning of March 29th. In view of this information, if they had probable cause at that time, they had ample time to obtain a warrant authorizing them to search and arrest the defendant. Had they had probable cause at that time they would have undoubtedly done so. It is not the province of the law to allow the agents to confirm their beliefs or suspicions by a search and then subsequently obtain an indictment on that illegal search. If they have sufficient information to constitute probable cause for an arrest, and if they have time for the same, such as in this case, the agents should obtain the necessary warrant.

CONCLUSION

We respectfully submit that in view of the above decisions and the evidence in this case, there was an arrest without a warrant, a crime was not being committed in the presence of the officers, and there was no probable cause to justify an arrest of the defendant without a warrant.

We respectfully submit that the motion to suppress the evidence in this cause should have been granted, and the case dismissed.

We respectfully submit that the judgment of the District Court should be reversed, and the above cause be dismissed.

Respectfully submitted,

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Attorney for Appellant.